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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CHARLES HIGGINS II et al., Plaintiffs and Appellants, v. DISNEY/ABC INTERNATIONAL TELEVISION, INC., et al., Defendants and Respondents.	B200885 (Los Angeles County Super. Ct. No. BC 338017)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul Gutman, Judge. Affirmed.

Mesisca, Riley & Kreitenberg, Dennis P. Riley and Rena E. Kreitenberg, for Plaintiffs and Appellants.

Christensen, Glaser, Fink, Jacobs, Weil & Shapiro, Patricia L. Glaser, Mark L. Block and Amy E. Duncan, for Defendants and Respondents.

Charles Higgins II and his four siblings appeal from the summary judgment that terminated their action for fraud, breach of oral contract, and several related claims against the broadcaster, producers, and others involved in the family's appearance in an episode of a home makeover reality television show. They also appeal from an earlier order sustaining without leave to amend a demurrer to their cause of action for breach of a written contract. We affirm both the summary judgment and the demurrer order.

FACTS AND PROCEDURAL HISTORY

Between April and June 2004, Charles Higgins II and his siblings – Michael, Charis, Joshua, and Jeremiah – were left orphans by their parents' deaths.[1] Charles was 21 at the time and Michael was 18. Charles became the guardian of Charis, Joshua, and Jeremiah, who were, respectively, 16, 15, and 14 years old. Charles's struggles to keep the five siblings together while living in their small apartment in Downey attracted the attention and assistance of their fellow congregants at the Norwalk Assembly of God Church. In early July 2004, congregants and long-time Higgins family friends, Phil and Loki Leomiti, took appellants into their Santa Fe Springs home to live with them and their three children.

Appellants' tragedy became news fodder, drawing the attention of Lock and Key Productions, the producer of the ABC reality television series *Extreme Makeover: Home Edition* (the show), which renovates houses for deserving and needy families.[2] In early

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[1] Their mother died of breast cancer on April 16 and their father died of heart failure on June 28. For ease of reference, we will refer to the Higgins children either individually by their first names or collectively as appellants.

[2] ABC contends that it does no more than broadcast the show and has no connection with defendants Lock and Key or Endemol, USA, Inc., which are involved in the actual production of the show. Accordingly, ABC argues it was not responsible for any conduct by the show's producers. For purposes of our analysis only, we assume (but do not decide) that Endemol and Lock and Key were ABC's agents, and that ABC would be liable for any misconduct by those entities. Because we conclude that ABC's purported agents are not liable, neither is ABC.

July 2004, right before the burial of appellants' father, Allie Greene, a Lock and Key associate casting producer, contacted appellants' church to see whether appellants would be interested in appearing on the show. Greene was told appellants might contact her after things settled down. Soon after the funeral, Charles called Greene, who told Charles the show was interested in helping appellants. Because appellants did not own a house or land where a house could be built, Charles told Greene the show should makeover the Leomitis' cramped house in order to accommodate both families. A taped casting interview of appellants and the Leomitis was scheduled in order for the show's producers to determine whether to use appellants and the Leomitis on the show. They were eventually selected in November 2004, and defendant Pardee Homes was chosen to rebuild the Leomitis' house.

On February 1, 2005, days before taping of the show was to begin, Lock and Key sent the Leomitis multiple copies of an applicant agreement and release (the agreement) that they and appellants had to sign individually before they could appear on the show. In essence, the agreement said that appellants and the Leomitis would be considered as show participants. If selected, they would appear on the show, receive certain gifts, and have improvements made to the home where they lived.[3] In exchange, appellants released their personal publicity rights, along with all claims and causes of action against the producers, the show participants, and various other unnamed parties connected with the show's production. Loki Leomiti presented the agreement to appellants four days later, right before taping was to begin. Instructed by her to quickly sign the agreements, appellants did so. Throughout the months leading up to that point, the Leomitis assured appellants that the home remodel was intended to let appellants live with the Leomitis permanently.

Once the renovation began and taping of the show was underway, appellants and the Leomitis were given a one-week Disneyworld vacation cruise, cars, computers, stereos, cameras, and other items. The Leomitis' house was demolished, the mortgage

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3 We discuss the relevant portions of the agreement in detail, *post*.

was paid off, and a new house was built to accommodate both families. The episode featuring appellants was broadcast in March 2005 and was one of the show's highest rated episodes. Soon after, according to appellants, the Leomitis began a campaign of harassment, humiliation, and intimidation designed to drive them out of the house. Eventually all five appellants moved out and the Leomitis kept possession of the gifts appellants received from the show. When appellants contacted Lock and Key about what happened, Lock and Key did little or nothing to help them. Some months later, their episode was rebroadcast.

Appellants sued the Leomitis for fraud, negligence, breach of contract, conversion, and other related claims. They sued ABC, Endemol, Lock and Key, and Pardee on related claims of fraud, concealment, and breach of contract, alleging that they had been promised a home where they could live permanently and that they were never told that they had no ownership interest in the Leomitis' renovated home, or that the Leomitis retained the right to evict them even after the Leomitis' house was rebuilt as a result of appellants' plight.[4] Respondents moved to compel arbitration of the claims pursuant to

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[4] Also named as a defendant was Disney/ABC International, Inc. For purposes of this appeal there appears to be no distinction between that entity and ABC. For ease of reference, when we refer to ABC, we therefore include Disney/ABC. We will refer to ABC, Lock and Key, Endemol, and Pardee (the builder) collectively as respondents, but we will refer to ABC, Disney/ABC, Lock and Key, and Endemol as the show defendants.

Appellants' operative second amended complaint stated the following 17 causes of action against the show defendants: (1) fraud by misrepresenting that appellants would have a legal right as owners to remain in the Leomitis' home; (2) fraudulent concealment of the fact that appellants had no such legal right and could be evicted by the Leomitis at any time; (3) negligent misrepresentation because their assurances of a permanent home caused those defendants to assume a duty of care to make sure they provided a permanent home for appellants and a duty to disclose that they had not done so; (4) rescission of the agreement due to fraud and because the contract was wholly one sided and was therefore illusory and lacked consideration; (5) breach of an oral contract to provide for appellants' safety and well being by securing them a permanent home; (6) breach of the written agreement, which appellants contend also promised them a permanent home; (9) portraying them in a false light when they rebroadcast the episode, misleading viewers to believe appellants were happy and secure; (10) engaging in unfair business practices (Bus. & Prof. Code, § 17500) because they made false promises concerning

the agreement's arbitration provision, and that motion was granted by the trial court. We granted appellants' writ petition and reversed the arbitration order, holding that the agreement was an adhesion contract and the arbitration provision was unconscionable. (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252-1254 (*Higgins I*).)

In March 2007, the trial court sustained without leave to amend respondents' demurrer to the sixth cause of action for breach of written contract on the ground the agreement could not reasonably be interpreted as promising appellants some ownership interest in the Leomitis' house.[5] A few months before bringing that demurrer, respondents filed separate but simultaneous summary judgment motions. As relevant here, the show defendants argued that appellants always knew and understood that the home being remodeled belonged to the Leomitis, that nobody associated with the show ever said or suggested that appellants would have some ownership interest in the rebuilt house, that the agreement also never made any such representation, and that the releases of their publicity rights barred appellants' claims to the extent they were based on the broadcast and rebroadcast of the show. Pardee's motion was based solely on the

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their permanent residence; (11) unfair competition (Bus. & Prof. Code, § 17200) based on the episode rebroadcast and the fraudulent procurement of the publicity release; (12) negligence by failing to provide them a legal right to stay in the Leomitis' home and by failing to stop the Leomitis from evicting them and taking control of their possessions; (13) breach of contract on the theory they were third party beneficiaries of the show's agreement with the Leomitis to rebuild their house; and (17) intentional infliction of emotional distress by continuing to rebroadcast their episode and by failing to stop the Leomitis from evicting appellants. The seventh and eighth causes of action were against the show defendants for appropriation of appellants' likenesses because the agreement's publicity release was allegedly obtained by fraud. As to Pardee, those two causes of action allege that no publicity release was obtained.

Phil and Loki Leomiti were named with respondents as defendants in causes of action one, two, three, twelve, and thirteen. The Leomitis were also named as defendants in the following causes of action: (14) to declare an involuntary trust over the house and appellants' personal belongings; and (15) conversion of appellants' property. Phil Leomiti was named as the sole defendant in the sixteenth cause of action for assault and battery against Joshua Higgins.

[5] The trial court had sustained a similar demurrer to the same cause of action in the first amended complaint with leave to amend.

publicity releases. Those motions were granted in July 2007, primarily on the ground that the releases were valid and any improper provisions of the agreement could be severed, leaving the remainder enforceable.

Appellants contend the trial court erred by sustaining the demurrer to their sixth cause of action for breach of contract because the terms of the agreement were ambiguous and could reasonably be interpreted as a promise to provide them some ownership interest in the Leomitis' house. Appellants contend the trial court erred by granting the summary judgment motions because: (1) the agreement was procedurally and substantively unconscionable; (2) the agreement was so lacking in mutuality that it fails for a lack of consideration; (3) the liability releases are unenforceable; and (4) there were triable issues of fact concerning the representations and promises made by the show defendants, thereby giving life to appellants' misrepresentation, concealment, breach of oral contract, and other related claims.

STANDARDS OF REVIEW

1. Demurrer

In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiff-appellant. Regardless of the label attached to the cause of action, we must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. (*Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 745.) The judgment will be affirmed if it is proper on any of the grounds raised in the demurrer, even if the court did not rely on those grounds. (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989.)

We will not, however, assume the truth of contentions, deductions, or conclusions of fact or law and may disregard allegations that are contrary to the law or to a fact which may be judicially noticed. When a ground for objection to a complaint, such as the statute of limitations, appears on its face or from matters of which the court may or must

take judicial notice, a demurrer on that ground is proper. (Code Civ. Proc., § 430.30, subd. (a); *Black v. Department of Mental Health, supra,* 83 Cal.App.4th at p. 745.) We may take judicial notice of the records of a California court. (Evid. Code, § 452, subd. (d).) We must take judicial notice of the decisional and statutory law of California and the United States. (Evid. Code, § 451, subd. (a).)

2. Summary Judgment

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of her pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in

accordance with the applicable standard of proof. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)[6]

Our first task is to identify the issues framed by the pleadings. (*Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1582.) The moving party need address only those theories actually pled and an opposition which raises new issues is no substitute for an amended pleading. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

1. The Demurrer to the Breach of Contract Claim Was Proper Because the Agreement Did Not Promise Appellants an Ownership Interest in the House

The agreement is a lengthy document, setting out in sometimes excruciatingly redundant detail the rights and duties of the parties. Stripped to its essence, however, it states that the show defendants will consider an appearance by appellants and the

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6 The trial court struck appellants' initial summary judgment opposition papers because they failed to comply with rules concerning the proper contents and format of those papers. Specifically, the court found that the response to moving parties' separate statement of undisputed fact was not divided by each separate issue, contained improper evidentiary objections in order to support contentions that certain facts were in dispute, failed to describe the evidence, and was vague and imprecise. The court ruled that the opposition brief was improper because it shoehorned large portions of argument in lengthy, single-spaced footnotes. The court gave appellants 10 days to file a revised opposition that conformed to the applicable rules. Appellants second opposition drew another challenge from respondents, who objected because the separate statement was still defective, the brief was still laden with footnotes, and because appellants submitted new evidence as part of a declaration from their lawyer. The trial court agreed and struck both the new evidence and the non-compliant portions of the new opposition brief.

Appellants contend the ruling on their second opposition was error and ask us to consider the entire opposition as submitted to the court. We will grant their request, but not because we believe the trial court erred As set forth below, the factual focal point of this case is what Allie Greene told Charles, and whether her statements can be construed as a promise to provide appellants some form of legal title to the Leomitis' house. The remainder is legal issues concerning the proper interpretation of the agreement and the enforceability of some portion of its releases. Nothing in the second set of opposition papers affects our analysis or the outcome of those issues. As a result, with one exception, we also ignore respondents' evidentiary challenges to portions of the opposition evidence, which the trial court sustained in a blanket, non-specific manner.

Leomitis on the program. If selected, certain unspecified improvements would be made to the home where they lived, and appellants and the Leomitis would receive certain other unspecified gifts. In exchange, appellants agreed to the unlimited use of their images and likenesses in connection with promoting or broadcasting the show, and agreed not to sue anybody connected with the show for matters relating to appellants' participation.

Appellants alleged that the agreement promised them permanent ownership and possession of the Leomitis' house. Theoretically, the clearest possible expression of such a promise would state that upon completion of the renovations, appellants would be granted an ownership interest of some type in the Leomitis' house. It would also likely define the scope and nature of that interest and make provisions for conveying title in that interest from the Leomitis to appellants. However, the agreement says nothing about appellants' ability to remain in the Leomiti house, nor in any other way addresses the issue of providing appellants or anyone else an ownership interest in that house. The record does not show, and appellants do not contend, that the Leomitis were ever presented with or signed documents purporting to convey an interest in their house.

Appellants concede the agreement does not expressly promise them an ownership interest in the Leomitis' house. They contend that certain language in the agreement is ambiguous enough to be read that way, however. For instance, the second paragraph of the lengthy form agreement says a proposed participant agrees that if any information furnished to the show defendants is false, or if the participant breaches the agreement, the producers may withhold any consideration the participant was to receive, "including without limitation the home improvements intended to be made on my home if I am selected to participate . . . ." In a section of the agreement under the heading **PARTICIPATION**, various obligations of a participant are spelled out. Included there are provisions stating that 24 to 48 hours' notice will be given before a participant and his family are "required to vacate our home . . . ." Before "leaving my home," the participant agrees to pose for photographs, and either before or after being asked to "leave my home," a participant agrees to make himself available for program preparations.

Participants agree that no representations or warranties are made with respect to improvements to "the Property," and that they will "accept the Property and Improvements" as-is and assume all risks associated with "retaking possession of and inhabiting the Property with the Improvements . . . ." The agreement also required participants to promise they would "pay all applicable state and federal or other taxes (including without limitation income taxes and all property taxes . . .) on the value of any Improvements and/or any other consideration [received] in connection with the Program . . . ."

By repeatedly using the phrases "my home" and "our home," by asking appellants to accept the property and its improvements as-is, and by obligating them to pay property taxes on the house, the agreement should be construed as a promise to provide them an ownership interest in the Leomitis' house, appellants contend. This interpretation is bolstered, they contend, by certain extrinsic evidence alleged in their complaint. This included an excerpt from the deposition testimony of Rob Day, a show defendant executive designated as the person most knowledgeable about the agreement. The excerpt set forth in the complaint quotes Day defining the contract term "participant" as "the families who will be getting a home," as well as his acknowledgment that appellants were participants. The other extrinsic evidence alleged in the complaint relates to conversations between Charles and Allie Greene of Lock & Key. According to the complaint, when Greene and Charles spoke in August 2004, she asked if appellants owned any land or property. Charles told her they were living with the Leomitis and did not own a house or land. Greene allegedly offered a choice between rebuilding the Leomitis' house or "having a separate home built." Appellants alleged that they elected to have the Leomitis' house rebuilt. Greene told Charles the show defendants "would do everything to have a home for [appellants] to live in," and later "advised [appellants] that they would receive a house if selected to appear on [the show]."

A contract is ambiguous if it is susceptible of more than one reasonable interpretation. An ambiguity may appear on the face of a contract, or extrinsic evidence may show a latent ambiguity. A court determining whether a contract is ambiguous must

first provisionally consider extrinsic evidence offered to prove the parties' mutual intention. If the court determines the contract may reasonably be construed as the extrinsic evidence suggests, the court must admit that evidence in order to interpret the agreement. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114.) The test for admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether the contract appears plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. (*Id.* at p. 114, fn. 5.) However, contract language must be interpreted as a whole in light of the circumstances and cannot be found ambiguous in the abstract. The interpretation must be fair and reasonable and may not lead to absurd conclusions. (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 842.) "A skillful attorney can conjure ambiguities from nearly any document, but such hypothetical difficulties often disappear when the surrounding circumstances are considered." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 773, fn. 16.)

With these rules in mind, we conclude the agreement is not reasonably susceptible of an interpretation that it promised to convey to appellants an ownership interest in the Leomitis' house as part of the renovation process. We begin with the circumstances surrounding the formation of the agreement. As we held in *Higgins I, supra,* 140 Cal.App.4th at page 1252, the agreement is a form contract. There is no dispute that all persons living in a house under consideration for a makeover by the show must sign the agreement. This necessarily includes minor children, visiting relatives, and others with no legal title in the house.

The agreement's apparent possessory references to leaving or vacating "my home" or "our home" connote an already existing state of affairs that pre-dates a final decision on participation. These references cannot reasonably be construed as recognition of an ownership interest by children or houseguests in the house under consideration. In fact, paragraph 9 of the agreement, which among other things made representations about the homeowner's title and right to grant permission to enter, film, and renovate the house, expressly stated that only the owner should fill in the blanks in that paragraph. Charles

initialed that he read that paragraph, and neither he nor the other appellants filled in that section of their agreements.[7]

It takes a much farther stretch to read the "my home" and "our home" language as a promise to convey such an interest, especially under these circumstances. Appellants were taken into the Leomitis' house in an apparent act of charity, and, according to the complaint, the Leomitis said during their taped interviews as prospective show participants that appellants could remain with them permanently, just as if it were their home. Appellants also alleged that the Leomitis "offered to take them in as their own children." Even though appellants were not owners of the house, they were clearly residents who were treated as family members. Children commonly refer to their parents' house as "my house," despite their lack of legal title. As just discussed, the agreement cannot reasonably be construed as extending title to non-owners living in the house. Instead, the possessory references appellants rely on can be viewed as no more than the sort of generic lay references used by residents of a home without regard to their actual ownership interest in the property.

The same is true of the provision concerning acceptance of the improvements to the property. The agreement defines the property as "my residence," and defines improvements to mean not just structural additions or changes to real property, but interior design, furniture, and furnishings. In short, the agreement is broadly worded to cover every resident of a home and whatever interests or possessions they might have in the house. For the reasons already discussed, this provision does not promise to enlarge any such rights at any time. As for the tax payment provision, it is limited to "applicable" tax liabilities. Because appellants did not have legal title in the Leomitis' house and were not promised title in the future, they had – and never would have – any property tax liability.

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[7] Appellants do not allege, and it would strain credulity to believe, that the Leomitis transferred any interest in their home to appellants after they moved in and before their selection as show participants.

Because the agreement is not reasonably susceptible of an interpretation that it promised to provide appellants an ownership interest in the Leomitis' house, the extrinsic evidence alleged in the complaint to support that interpretation is not relevant.[8] We therefore affirm the order sustaining without leave to amend the demurrer to the appellants' sixth cause of action for breach of written contract.

2. There Is No Evidence of a Representation to Provide Appellants With an Ownership Interest in the Leomitis' House

Most of appellants' causes of action against respondents depend, in whole or in part, on allegations that they falsely promised appellants a permanent place to live with some ownership interest in the Leomitis' house.[9] Their complaint alleged that such representations were made by Allie Greene when she first spoke with Charles, and in the months that followed, leading up to the taping of the show. The show defendants' summary judgment motion included a declaration from Greene denying that she ever made any such statements. According to Greene, she told Charles that if appellants and the Leomitis were selected as show participants, the Leomitis' house would be renovated. She never said anything about building a home for appellants or about making sure they would have their own home.

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8 As discussed next, evidence of similar statements used by appellants in opposition to the summary judgment motions does not raise triable issues of fact that respondents made any false representations to that effect either.

On a related topic, respondents sought and the trial court granted a motion in limine to exclude evidence concerning the show defendants' subjective intent as to the meaning of the agreement. Appellants contend this was error, but we do not see the relevance of a motion in limine ruling to either a demurrer or summary judgment that acted to prevent the case from ever going to trial. Instead, we confine ourselves to a consideration of the allegations of the complaint when analyzing the demurrer, and to the moving and opposition summary judgment papers when analyzing that motion.

9 The show defendants raised this point in their summary judgment motions. Therefore even though the trial court did not grant summary adjudication as to each relevant cause of action on this ground, we may affirm on that basis. (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 727.)

Appellants countered with two declarations from Charles, one from November 2005 that had been originally submitted in opposition to respondents' petition to compel arbitration, and the other a "supplemental declaration" prepared specifically in opposition to the summary judgment motions. In both declarations, Charles claimed Greene asked him during their first phone conversation if appellants owned a home or land. Charles told her they did not. According to Charles, Greene then asked if appellants wanted the Leomitis' house rebuilt or if they "wanted to have a home of our own built." Charles claimed that, at various times, Greene also made the following statements: that the show defendants wanted to make it so his family would have a home to live in together; that if selected, appellants would "get a home, a vacation, cars, and other stuff;" if we told a good enough story during the casting interview, "we would get a home;" if selected, appellants would get a house; and that "the point of the show was to provide us with a home we (my family) could live in together." Based on these statements, Charles believed appellants would "win the home with the Leomitis." He therefore instructed his siblings to cooperate with the casting process and sign the agreement. As set forth below, when viewed in context under the circumstances of this case, the statements attributed to Greene are too vague and indefinite to constitute factual misrepresentations.

The elements of causes of action for fraud and negligent misrepresentation are very similar. Both are defined as deceit, but the state of mind requirements are different. Fraud is an intentional tort, whose elements are (1) misrepresentation; (2) knowledge of its falsity; (3) made with the intent to defraud; (4) justifiable reliance on the fraud; and (5) resulting damage. Negligent misrepresentation lacks the element of intent to deceive. When the defendant makes false statements in the honest belief they are true, but without reasonable grounds for that belief, he may be liable for negligent misrepresentation. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 85-86.) Whether an actionable misrepresentation was made depends frequently on the facts and circumstances existing when the statements were uttered. (*Bank of America Nat. Trust & Sav. Assn'n v. Hutchinson* (1963) 212 Cal.App.2d 142, 148.)

Appellate courts in California and many other states have held that some statements are too vague and indefinite to serve as actionable misrepresentations. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835 [vague representation of value was mere opinion, not misrepresentation of fact]; *Lim v. The TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 694 [statement that auction would be fair and open was too vague, although other representations were sufficiently specific]; *Shirreffs v. Alta Canyada Corp*. (1935) 8 Cal.App.2d 742, 748-749 [recognizing that on proper facts, a vague and indefinite representation might defeat contract rescission claim based on fraud]; *In re Marriage of Bower* (1980) 87 Ill.App.3d 324, 326 [former husband petitioned to vacate divorce judgment because it was procured based on former wife's fraudulent representations; order denying petition affirmed because allegations that former wife promised she would adequately provide for their minor son and make a will to that effect lacked specific details of those alleged promises and were therefore too vague and indefinite]; *Sipes v. Kinetra, L.L.C.* (E.D. Mich. 2001) 137 F.Supp.2d 901, 908-910 [former company executive sued for fraud based on promise to provide him equity share of the company upon its dissolution; summary judgment for company affirmed under Michigan law because the alleged bare promise of equity lacked sufficient details of the terms of such an arrangement].)

In order to analyze the sufficiency of the alleged misrepresentations, we return to the circumstances in which they were made. We begin with the statement in Charles's supplemental declaration that during his first phone conversation with Greene, she offered him a choice of renovating the Leomitis' house or of having a home built for appellants, despite the fact that appellants did not own a home or a lot where a home could be built. During his deposition, Charles testified differently about that first phone conversation with Greene. When asked whether he told Greene that appellants preferred to renovate the Leomitis' house, Charles answered that "at that time we didn't have an option because we didn't own any property." Asked to clarify, Charles said: "Because first she asked us if we own any property because she wanted to know because if we did, then they would build the home off [*sic*] that property. [¶] But since we didn't, we

didn't have an option of whether to do it on our own property because we didn't have any. So we were just left with the decision to do that." The trial court granted the show defendants' motion to disregard any portions of Charles's declaration that were contrary to this testimony. Appellants contend the trial court erred because the deposition testimony does not contradict Charles's declaration. We disagree. Charles's statement that Greene offered appellants a choice between renovating the Leomitis' house or building them one of their own *after* Greene learned appellants owned neither a house nor land is squarely contradicted by Charles's deposition testimony that after telling Greene they owned neither house nor land they had no option except to renovate the Leomitis' house. We therefore disregard that portion of Charles's declaration. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120.)

It was therefore apparent to everyone – appellants, the show defendants, and the Leomitis – that the show would renovate the Leomitis' house. It was also apparent that the motivation for this was the Leomitis' apparent act of charity by taking appellants into their home and holding them out to the world as their own children. This is confirmed by the raw footage of the videotaped casting interview conducted at the Leomitis' house by Greene and another Lock & Key employee.[10] The interview begins with an exterior shot of both families and a greeting from Phil Leomiti, who says, "This is my big happy family – the Leomitis/Higgins." Loki Leomiti says they should be picked for a home makeover because "the house is not big enough for the kids that we have brought into our home. You know the reason for taking these kids into our home is . . . they don't have nobody and if you can just imagine how it is to have nobody and you're a child, 21 is still a child to me. Kids need some foundation . . . you know, they need stability and we can give this to these kids then you know, what's five years of sacrificing or six years [or] whatever it may be to give these kids a home and parents." Phil Leomiti then says, "[W]e love the kids dearly . . . they're like our babies." Loki Leomiti adds that they want to provide stability and love to appellants even if they are not selected for the show

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10 We have read the transcript of that interview, and viewed a DVD recording of it.

"because as long as they have a roof over their head and food on the table, that's the main thing you know . . . that's our big focus and that's our concern you know that we just love these kids like we love our own." Loki Leomiti concludes by saying that "this is not temporary, this is not . . . or after six months you know, they've got to go . . . it's not even like that . . . you know their education . . . you know and you know they'll always have a home to come home to let's just put it that way . . . our home is their home and it's not oh it's my house, it's your house . . . it's our house and that's just how we look at it."

During one of several takes, Charles nominated the Leomitis for a home makeover because "they took [us] in when we lost both of our parents in the same year – this past year and I just wanted to do something special for them like redo the house." In another take of that scene, Charles nominates the Leomitis for a home makeover because the Leomitis took them in and a home renovation would be one way of thanking them because "they deserve it."[11] The other Higgins children made similar comments, also referring to how "we" need more space. Similar statements were made by appellants and the Leomiti children while gathered around a table in the garage.

When viewed against this backdrop, statements by Greene to the effect that appellants would have a home they could live in together are nothing more than a confirmation of the story told jointly by appellants and the Leomitis – that appellants were now part of the Leomiti family and would be living there as if they were the Leomitis' children. Because the house was so cramped, it was being renovated to allow the Higgins to live there comfortably. As with the written agreement, these were not statements of ownership or the intent to convey ownership. Even assuming some degree of falsity in the statements, they were, at most, the kind of loose, exaggerated words that do not qualify as actionable misrepresentations. In order to accomplish what appellants contend they were promised, a specific promise to convey title in some form was

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11 Charles contends that Greene told him to nominate the Leomitis, suggesting that this somehow makes his statements untruthful. It does not. Because appellants had no choice but to select the Leomitis' house for a makeover, even if Greene told him to nominate the Leomitis during the casting interview, it remained just as evident to Charles and his siblings that the house belonged to the Leomitis.

required. (Compare *Warren v. Merrill* (2006) 143 Cal.App.4th 96, 110 [substantial evidence supported judgment for fraud based on false representations by condominium buyer's real estate agent that agent would place buyer's name on title after purchase was completed in name of the agent's daughter].) Nowhere in the pleadings, the summary judgment proceedings, or on appeal, have appellants alleged or produced evidence to that effect. As a result, we hold there are no triable issues of fact that misrepresentations were made by the show defendants to the effect that appellants would obtain an ownership interest in the Leomitis' house.[12]

As noted above, this holding affects several causes of action. The first cause of action for fraud and the third for negligent misrepresentation are based solely on the existence of the alleged ownership misrepresentations. So too is the fifth cause of action for breach of oral contract. By analogy to our earlier discussion concerning appellants' cause of action for breach of written contract, the evidence shows that the statements attributed to the show defendants were too vague and indefinite to constitute the terms of an enforceable oral agreement to provide an ownership interest in the Leomitis' house. (See *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1328 [no oral contract where evidence showed only vague and uncertain promises].) The second cause of action for concealment alleges that, after making false representations about appellants' ownership interest in the Leomitis' house, the show defendants failed to disclose appellants' lack of such an interest or the "conflict of interest" between appellants and the Leomitis. As argued on appeal, appellants contend the show defendants' duty of disclosure arose because they made incomplete and false representations about providing appellants a home. Because no such false and incomplete representations were made, the second cause of action fails. The twelfth cause of action, for negligence in failing to provide for appellants' long-term security, is based solely on the show defendants having assumed that duty of care because they

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12 Based on the allegations of the complaint and the evidence submitted in opposition to the summary judgment motion, any statements that are even arguably reflective of some type of ownership or possessory interest in the house came from the Leomitis.

agreed to provide appellants a new home. Therefore it fails as well. The fourth cause of action for rescission was based in part on the fraud allegations and, to that extent, summary adjudication of that claim was proper.[13] So too are: the seventh cause of action against respondents for appropriation of likeness; the eighth cause of action for using appellants' likeness in violation of Civil Code section 3344; the ninth cause of action for false light, at least to the extent it incorporates by reference the fraud allegations; the tenth cause of action for unfair business practices; and the eleventh cause of action for unfair competition.[14]

3. *The Relevant Portions of the Agreement Are Valid and Enforceable*

Appellants contend the entire agreement is void and unenforceable because: (1) numerous provisions releasing respondents from various forms of legal liability are both procedurally and substantively unconscionable; and (2) it lacked both mutuality and consideration because the show defendants were not obligated to do anything.

Unconscionability can be both procedural and substantive. Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power. Substantive unconscionability focuses on whether the disputed contract terms are one-sided or overly harsh. Although both must be present, a sliding scale is used: the more substantively oppressive the terms, the less procedural unconscionability is required to hold the terms unenforceable. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) Under Civil Code section 1670.5 (section 1670.5), the trial court has discretion to strike any unconscionable clauses and enforce the remainder, or refuse to enforce the entire agreement. (*Id.* at p. 122.)

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13 As set forth below, there are no triable issues of fact supporting the remaining basis of the rescission claim – that the agreement is unenforceable because it is unconscionable and illusory.

14 We also discuss the remaining bases of these causes of action *post*.

A trial court should decline severance and refuse enforcement only when an agreement is permeated by unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at p. 122.) This requires an examination of the various purposes of the contract. If the central purpose is tainted with illegality, then the contract as a whole cannot be enforced. If the illegal portions are collateral to the contract's main purpose and can be removed by severance or restriction, then that is the appropriate course. (*Id.* at p. 124.) The remedies of severance or restriction are designed to prevent parties from gaining undeserved benefit or suffering undeserved detriment from voiding the entire agreement, especially when there has been full or partial performance of the contract. It also tries to save a contractual relationship if doing so would not condone an illegal scheme. The overarching inquiry is whether the interests of justice would be furthered by severance. (*Id.* at pp. 123-124.)

We assume for the sake of analysis only that the agreement was in some measure procedurally unconscionable. Appellants contend that numerous provisions of the agreement were also substantively unconscionable either because they are illegal, grossly unfair, or one-sided because they impose no mutual obligations on the show defendants. Many of those relate to matters that never became at issue, such as: medical release forms authorizing an examination of a participant's medical and psychiatric records to determine his fitness to participate in the show; forms authorizing emergency medical care and releasing the show defendants and others for liability for such care; indemnifying the show defendants for losses caused by a participant's disclosure of certain confidential show information; indemnifying the show defendants if production is cancelled due to a participant's untruthful representations to the show defendants; limiting a participant's legal remedies against the show defendants, while preserving the same remedies for the show defendants; and irrevocably appointing the show defendants as a participant's attorney-in-fact. We have read these provisions and, while some may be troubling in the abstract, we do not agree with appellants' characterization of many of them. Rather than parse the language of those provisions, as set forth below, we conclude they are irrelevant and could be properly severed because this was a fully

executed agreement that was fully performed by the show defendants and because none of the contingencies covered by those provisions ever came into play here.

Instead, we focus on the few provisions directly relevant to this action – those releasing respondents for tort liability for matters arising in connection with the show, including claims for invasion of privacy and appropriation of likeness. First are paragraphs 12 and 13, where participants acknowledge that their activities in connection with the show will be recorded and that, as a result, private, personal, and embarrassing matters may be publicly broadcast. The show defendants are granted permission to fully exploit those materials in any way, and they are released from any and all claims and liability based upon a participant's right of privacy, intentional or negligent infliction of emotional distress, defamation, and any other torts in any way relating to the disclosure and exhibition of personal information about the participant. These provisions are not highlighted or displayed in boldface and appear in sequence with paragraphs 4 through 19 under the heading **PARTICIPATION**.

The others are found under the boldfaced heading "**RELEASE AND INDEMNITY**." Paragraph 54 defines "releasing parties" as the participants and their spouses, next of kin, guardians, and others. Paragraph 55 defines "released parties" as the show defendants, Pardee Homes, program broadcasters and sponsors, and their affiliated entities, directors, officers, and others. These are not in boldface and are not to be initialed by a participant. Paragraphs 56, 57 and 59 are in boldface and were initialed by appellants. Paragraph 56 states that the releasing parties will not sue any of the show participants "for any injury, illness, disease (including, without limitation, any sexually transmitted disease), trespass, damage, loss or harm to me or my property, or my death, howsoever caused, resulting or arising out of or in connection with . . . the [show], . . . whether or not caused by or arising out of the act or omission . . . of the released parties or any of the participants in the program."

Paragraph 57 states that the releasing parties unconditionally release and discharge all show participants and the released parties from "any and all claims, liens, agreements, contracts, actions, suits, costs, . . . and liabilities of whatever kind or nature . . . whether

now known or unknown, suspected or unsuspected, and whether or not concealed or hidden . . . arising out of or in connection with" the show. The released claims shall include "those based on negligence or gross negligence of any of the released parties or . . . the other participants . . ., wrongful death, personal injury, [negligent and intentional] infliction of emotional distress . . ., products liability, breach of contract, breach of any statutory or other duty of care owed under applicable law, libel, slander, defamation, invasion of privacy, violation of any right of publicity or personality, infringement of copyright or trademark, loss of earnings or potential earnings, kidnapping, false imprisonment, and those based on my dissatisfaction with the improvements or my possession or use thereof."

Paragraph 58 sets forth the waiver of Civil Code section 1542 and releases claims that are not known or suspected. It also states that the releasing parties have either been advised by legal counsel or have chosen not to consult counsel.

Appellants contend, and the trial court agreed, that to the extent any of these provisions purport to release respondents from intentional torts, gross negligence, or violations of statutory law, they are not enforceable. (Civ. Code, § 1668.) Instead, the trial court found those provisions could be severed. It also found that most of the other provisions appellants claimed were substantively unconscionable were not improper. The trial court focused on the nature of the agreement: allowing appellants to appear on the show and receive its benefits in exchange for giving up their publicity rights and limiting respondents' liability for torts occurring in connection with the show. The releases geared to those ends were not surprising or unexpected and, when viewed in the context of the agreement's primary purpose, were not unconscionable. We agree.

We begin our analysis with the primary purpose of the agreement. As the trial court noted, that was to determine whether appellants would become show participants and to have them waive their publicity rights if selected. Such a purpose is clearly legal. So too are the purposes behind the publicity releases in paragraphs 12 and 13, and the release of claims related to any violation of the rights of publicity or personality in paragraph 57. Not addressed by appellants, but noted by the trial court, was paragraph 2

of the agreement, where appellants granted the show defendants the perpetual right to use their name and likeness in connection with the show for any purpose. Appellants do not contend, and we do not believe, that those limited releases are unconscionable.

Nor do we believe the trial court abused its discretion by severing the remaining objectionable provisions. As previously discussed, the show defendants did not make any actionable misrepresentations concerning appellants' ownership interests in the Leomitis' house and had no tort law duty to reveal the absence of such interests. Nor did they have any contractual obligations in that regard. All that the agreement required of the show defendants once appellants were selected was to renovate the Leomitis' house and supply them with various other gifts. Appellants alleged that they received numerous gifts from show defendants, including a vacation, computers, cameras, and art supplies. Cars were also provided, but were diverted under false pretenses by Phil Leomiti, they alleged. In short, the show defendants fully performed. As a result, any absence of consideration or mutuality was cured. (*Sayward v. Houghton* (1898) 119 Cal. 545, 548; *Stone v. Burke* (1952) 110 Cal.App.2d 748, 756-757.)

Furthermore, respondents argued below that any invalid portions of the liability and publicity releases should be severed, with enforcement limited to only those that were legitimate. In addition, respondents tackled appellants' causes of action on their merits.[15] They repeat these contentions on appeal and have made no attempt to apply the various releases to causes of action for intentional wrongdoing or violations of statutory rights.

Under these circumstances, failing to sever would have given appellants a windfall. Appellants would have received the benefits of the agreement – living in the renovated house for some period, along with the other gifts – while withdrawing the publicity and liability releases, which were the only meaningful consideration appellants provided. As a result, we hold that the trial court did not abuse its discretion by severing the unlawful provisions and enforcing the remainder of the agreement. As a result, to the

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15 Nor have appellants asserted claims for products liability, kidnapping or false imprisonment.

extent the fourth cause of action for rescission was based on the contract invalidity argument, summary adjudication was proper.[16]

4. *The Appropriation of Likeness and False Light Claims Are Barred by Appellants' Release of Their Publicity Rights*

The seventh and eighth causes of action allege that the show defendants appropriated appellants' likenesses by the initial and continued re-broadcasting of their episode. The ninth cause of action alleges that the show defendants portrayed appellants in a false light by rebroadcasting the show after appellants were made to leave the Leomitis' house. The agreements' publicity releases were procured by fraud, they alleged, based on the ownership misrepresentations discussed and rejected above. To the extent these causes of action are based on the non-existent fraud, they necessarily fail. Those causes of action also appear to be based in part on allegations that the agreement was illusory, a contention we have also previously rejected. Therefore, as to the show defendants, the publicity releases are valid and those causes of action fail in their entirety. As to Pardee homes, appellants alleged that no publicity releases were signed, and that Pardee appropriated their likenesses by portraying them on the company's website. The trial court found that appellants did sign a Pardee release after the show was broadcast, and that triable facts issues concerning the scope of that release prevented summary adjudication on that basis. However, the trial court held that the agreement's publicity releases, which by their terms extended to Pardee, were valid and justified summary adjudication. Because Pardee was listed as a released party to any claims for violation of

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16 The only other basis for this cause of action was the alleged misrepresentations about appellants' ownership interest. As set forth above, there was no evidence to support that claim, and the fourth cause of action fails in its entirety.

Appellants also contend that the agreement was the product of undue influence. As respondents point out, this issue was not raised below and is therefore waived. We reject appellants' contention that their general reference to factual circumstances that could be construed as undue influence – set forth in their summary judgment opposition papers' statements of facts – raised the issue.

publicity rights in paragraphs 53 and 57 of the agreement, we agree with the trial court and hold that summary adjudication was also proper as to Pardee.[17]

5. *The Unfair Competition and Business Practices Claims Also Fail*

The tenth and eleventh causes of action allege that the show defendants violated, respectively, the unfair business practices statute (Bus. & Prof. Code, § 17500) and the unfair competition law (Bus. & Prof. Code, § 17200) by their fraudulent representations about ownership and by continuing to rebroadcast their episode despite their knowledge that they have been removed from the Leomitis' house. Based on our holdings that there was no such fraud and that the publicity releases are valid, both claims must fail.

6. *Appellants Have Waived Their Third Party Beneficiary Claim*

Appellants' thirteenth cause of action alleged that the agreement between the show defendants and the Leomitis made them third party beneficiaries who were supposed to receive title to the home and possession of the other gifts. The trial court granted summary adjudication of this cause of action because the agreement did not expressly make them third party beneficiaries. Appellants do not challenge that ruling, and we therefore deem that issue waived.

7. *Intentional Infliction of Emotional Distress*

Appellants' seventeenth cause of action alleged that the show defendants intentionally inflicted emotional distress by: (1) their fraudulent procurement of the agreement; (2) their failure to step in and safeguard their right to remain in the Leomitis' house; and (3) their continued rebroadcast of the show.

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[17] Appellants contend that the show defendants are not entitled to summary adjudication of the seventh and eighth causes of action for appropriation of likeness because their summary judgment motions did not address those claims. They are wrong. The notice of motion said that the entire complaint failed because appellants released their claims, and they specifically argued that the publicity releases barred the seventh and eighth causes of action. We therefore reject this contention.

The elements of intentional infliction of emotional distress include outrageous conduct that goes beyond the bounds of what civilized society will tolerate. (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) As discussed, there was no evidence of fraud by the show defendants. Neither did they have a duty to intervene in an essentially private matter between appellants and the Leomitis. Finally, as the trial court found, rebroadcasting the episode cannot be considered sufficiently outrageous when appellants expressly agreed that the show defendants could do so.

DISPOSITION

For the reasons set forth above, the order sustaining without leave to amend the demurrer to appellants' sixth cause of action for breach of contract, and the summary judgment entered for respondents, are affirmed. Respondents shall recover their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.